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No. 00-798

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC; CHARLESTON WOMEN'S MEDICAL CLINIC, INCORPORATED; WILLIAM LYNN, M.D., on behalf of themselves and their patients seeking abortions,

Petitioners,

—v.—

DOUGLAS E. BRYANT, in his official capacity as Commissioner of South Carolina Department of Health and Environmental Control; CHARLES M. CONDON, in his official capacity as Attorney General of the State of South Carolina; GOVERNOR OF SOUTH CAROLINA,

Respondents.

ON PETITION FOR A *WRIT OF CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In their Petition for a Writ of Certiorari ("Petition" or "Pet."), Petitioners explained that the decision of the Fourth Circuit conflicts with decisions of this court and other courts of appeals in the following six ways: (1) by disregarding the trial court's factual findings without assessing whether they were clearly erroneous; (2) by failing to apply heightened scrutiny to the regulation's differential treatment of abortion and all other comparable medical procedures; (3) by applying a test less stringent than even rational basis review in evaluating the regulation's classifications; (4) by upholding an abortion restriction that threatens, rather than promotes, maternal health and departs from accepted medical practice; (5) by limiting the constitutional protection of abortion only to the abortion decision and not to the implementation of that decision; [1] and (6) by holding that the standard of *United States v. Salerno*, 481 U.S. 739, 745 (1987), rather than that of *Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992), applies to facial challenges to abortion restrictions.

Respondents' Brief in Opposition to the Petition ("Respondents' Brief" or "Op. Cert.") neither addresses these conflicts, nor attempts to dispute them. Instead, it argues that the Petition should be denied because the Fourth Circuit properly upheld South Carolina Annotated Regulations 61-12 (West Supp. 1998) ("the Regulation"). It is the existence of the aforementioned conflicts, however, not the ultimate question of whether the Regulation is constitutional, that governs the grant of certiorari. Because the existence of these conflicts is both real and undisputed, the Petition should be granted.

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[1] This Court's decisions and those of the courts of appeals protect both the abortion decision and the implementation of that decision. Pet. at 28-29. Respondents' brief completely fails to address the conflict between these cases and the decision below. Accordingly, Petitioners will not discuss that conflict further in this reply.

ARGUMENT

I. The Court Below Disregarded Factual Findings That Were Not Subject to Plenary Review.

The district court made numerous factual findings regarding the effects of the Regulation.[2] These findings include the following:

> First-trimester abortions are commonly and safely provided in unregulated physicians' offices and outpatient clinics. A122, A148.
>
> Enforcement of the Regulation would not protect women's health. A153.
>
> Many requirements of the Regulation conflict with or exceed accepted medical practice. A129-30, A135, A152-61, A175-78.
>
> It would be costly for abortion providers to comply with the Regulation. A145, A147.
>
> Compliance with the Regulation would increase the price of an abortion at Charleston Women's Medical Clinic by $36.48 to $75.03, at Palmetto State Medical Clinic by $93.09 to $170.39, at Dr. Lynn's Beaufort office by $115.67 to $367.50, and at Greenville Women's Clinic by $22.68 to $32.39. A146-47.
>
> Enforcement of the Regulation would likely force the closure of Dr. Lynn's Beaufort office, leaving no abortion provider in that geographic area. A147.

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[2] Additional factual findings, many of which were disregarded by the Fourth Circuit, are described in the Petition. Pet. at 3-9.

> Increasing the distance a woman has to travel to obtain an abortion increases the cost of her abortion. A140, A183.
>
> The increased costs on abortion that would be imposed by enforcement of the Regulation would cause a significant number of women seeking abortions in South Carolina to delay or forgo abortions at the expense of their health. A148, A152-53.

The court below did not set aside any of these factual findings as clearly erroneous. Instead, it disregarded or replaced many of them, and then upheld the Regulation on the basis of *its own* findings of fact. *See* Pet. at 11-15.

Respondents defend the Fourth Circuit's fact-finding by claiming that the relevant facts are subject to plenary review because they mix questions of law and fact and because they determine the outcome of Petitioners' constitutional claims.[3] In support of this argument, Respondents cite to a case applying the "constitutional fact doctrine." Op. Cert. at 5 (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).[4]

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[3] Respondents, like the Fourth Circuit, repeatedly ignore the underlying record and the district court's factual findings. *See e.g.*, Op. Cert. at 10 (asserting, without any citation to the record or the district court's findings, that the regulation is "reasonably related to the State's legitimate interest in ensuring that women have abortions under safe conditions"); *id.* at 11 n. 5 (arguing, contrary to the evidence and the district court's findings, A147 n.11, and on the basis of a statement in a web page not contained in the record, that Planned Parenthood will "soon" be offering abortions in Beaufort); Op. Cert. at 11 (stating, contrary to Dr. Henshaw's testimony and the district court's findings, A148, A152-53, that "there is no proof regarding the number of women who will be affected by the [Regulation's] price increases . . .").

[4] Contrary to Respondents' assertion, Op. Cert. at 4-5, the district court did not acknowledge that any of its findings were mixed questions of law and fact. It simply stated that its findings of fact should be construed as

Respondents' argument fails for a number of reasons. Moreover, their attempt to expand the constitutional fact doctrine to this case would, if accepted, make every subsidiary fact in a constitutional case subject to *de novo* review, in wholesale contravention of Federal Rule of Civil Procedure 52(a).

First, Respondents' contention ignores the general principle that courts of appeals may not set aside fact findings unless those findings are clearly erroneous. Fed. R. Civ. P. 52(a); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 534 n.8 (1979); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether on the entire evidence (it) is left with the definite and firm conviction that a mistake has been committed" (quotation omitted)).

Second, this Court has never applied the constitutional fact doctrine to abortion cases. Instead, it has repeatedly and recently given deference to the trial courts' factual findings as to the effects of abortion restrictions. *Stenberg v. Carhart*, 120 S. Ct. 2597, 2610-12 (2000); *Casey*, 505 U.S. at 887-93; *Hodgson v. Minnesota*, 497 U.S. 417, 437-44 (1990); *see also Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 131-33 (3rd Cir. 2000); *Ragsdale v. Turnock*, 841 F.2d 1358, 1370-71, 1373-74 (7th Cir. 1988). Indeed, this Court has largely limited its application of the constitutional fact doctrine to the First Amendment.[5] *See,*

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such regardless of the section of the opinion in which they are located. A103 n.1.

[5] This Court has also applied the constitutional fact doctrine to ensure protection of the rights of criminal defendants. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 115 (1995); *Miller*, 474 U.S. at 117-18.

e.g., Rankin v. McPherson, 483 U.S. 378, 386 (1987); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984).

Third, when this Court has undertaken review of the record under the constitutional fact doctrine, it has done so to *ensure protection* of individual constitutional rights. *See, e.g., Thompson v. Keohane*, 516 U.S. 99, 115 (1995); *Rankin*, 483 U.S. at 385-86; *Miller*, 474 U.S. at 117-18. By contrast, the court below found its own facts in order to *undo* the district court's protection of Petitioners' constitutional rights.

Fourth, the constitutional fact doctrine applies only to questions that intertwine law and fact on the ultimate constitutional issue, not to subsidiary fact findings. *See, e.g., Miller*, 474 U.S. at 112 (question of whether confession was voluntary was subject to *de novo* review, but subsidiary factual questions, such as the conduct of the police, were not); *id.* at 116 (dispositive question of voluntariness has "a uniquely legal dimension"); *Jacobellis v. State of Ohio*, 378 U.S. 184, 187-88 (1964) (court will independently review whether the material involved is protected by the First Amendment); *Connaughton v. Harte Hankes Communications, Inc.*, 842 F.2d 825, 842 (6th Cir. 1988) (de novo review under the constitutional fact doctrine is limited to the ultimate conclusion and does not extend to subsidiary factual questions), *aff'd*, 491 U.S. 657 (1989). The findings at issue here are factual ones subsidiary to the larger questions of whether the Regulation violates equal protection, fails to properly balance a woman's right to abortion with the state's interest in promoting maternal health, or imposes an undue burden.[6]

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[6] Respondents ignore the distinction between subsidiary facts and ultimate constitutional facts. For example, they claim that because factual findings regarding the costs and increased travel caused by the Regulation bear on the question of undue burden, those facts are subject to *de novo* review. Op. Cert. at 7.

Finally, the constitutional fact doctrine is inapplicable to factual findings that are based on the trial court's assessment of witness credibility. *See, e.g., Miller*, 474 U.S. at 114 (where an issue involves the credibility of witnesses, "there are compelling and familiar justifications" for according the trial court's determinations "presumptive weight"). The factual findings at issue here, *supra* at 2-3, were based largely on witness testimony and the district court's ability to assess the credibility of those witnesses.[7]

Because the district court's factual findings are not subject to the constitutional fact doctrine, the court below should not have disregarded them without determining that they were clearly erroneous. The Fourth Circuit made no such determination, and Respondents point to no factual finding they claim is clearly erroneous. Instead, Respondents argue that the Regulation is medically reasonable and not

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[7] For example, in finding that the Regulation substantially departs from accepted medical practice and exceeds national medical guidelines, A129, A152-161, A175-78, the district court relied not only on textual differences between the Regulation and national medical guidelines and the relevant written comments of the National Abortion Federation ("NAF") and the American College of Obstetricians and Gynecologists ("ACOG"), Pet. at 12-15, but also on (1) the testimony of DHEC officials that they included many regulatory provisions simply to standardize its regulations and not because they were relevant to abortion, A127-29, A151-52; and (2) the testimony of numerous expert physicians that many of the Regulation's requirements were medically inappropriate as applied to first-trimester abortion and that ACOG guidelines are flexible guidelines rather than mandatory standards. *See* A134-36, A138-39, A142-43, A152, A153-161. Similarly, the district court relied "upon the medical and other testimony presented" in "find[ing] as a fact . . . that the increased cost of providing abortions resulting from the regulation will prevent a significant number of women from obtaining an abortion or, at a minimum, delay them from obtaining the abortion, both of which carry increased risks to the health of women." A148, A135-36, A140. Finally, as Respondents concede, Op. Cert. at 8, the district court relied on the testimony of Dr. Henshaw in concluding that the closure of Dr. Lynn's Beaufort office would increase the cost of abortion for women in that area. *See* A140, A183.

burdensome, and that Dr. Henshaw's testimony was speculative. Op. Cert. at 7-12. These arguments, which might be relevant to a *de novo* review of the record, simply have no place at the appellate stage of the proceedings.[8]

II. The Court Below Improperly Conditioned Application of the Fundamental Rights Prong of Equal Protection Analysis on the Establishment of a Violation of the Substantive Right.[9]

The decision below conflates Petitioners' due process and equal protection claims, holding that the Regulation's differential treatment of abortion and comparable medical procedures will be subject to rational basis review unless Petitioners establish a *violation* of their right to due process. *See* Pet. at 17-18. The Fourth Circuit's failure to apply heightened scrutiny to a classification that adversely affects and impinges upon fundamental rights conflicts with numerous decisions of this Court and the courts of appeals. *See* Pet. at 16-17. Indeed, the decision below conflicts with this Court's recent ruling in *Bush v. Gore*, which scrutinized a voting classification under the fundamental rights prong of equal protection review without determining whether the

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[8] Notably, while Respondents strenuously argue the merits of Dr. Henshaw's testimony in their brief, Op. Cert. at 8-9, the Fourth Circuit made no such conclusions about that testimony, but simply ignored it. Both Respondents and the court below also disregard the testimony of other expert physicians that the costs imposed by the Regulation will cause women to delay or forego abortions at the expense of their health. A135-36 (testimony of Drs. Buffkin, Campbell, Lynn & Manning).

[9] In addressing Petitioners' due process claim, Respondents attempt to defend their differential treatment of abortion and medically comparable procedures on the grounds that the enabling legislation told them to regulate abortion. But that legislation cannot relieve Respondents of their obligation to comport with the Constitution, and it gave Respondents the discretion to treat abortion similarly to comparable procedures. A193.

right to vote had been violated. 121 S. Ct. 525, 529-33 (2000). Respondents wholly ignore this conflict.

III. The Court Below Applied a Test Less Stringent than Rational Basis Review to the Regulation's Classifications.

In evaluating Petitioners' equal protection challenge to the Regulation's classifications, the court below applied a level of scrutiny even more deferential than the rational basis test. By failing to examine whether the challenged regulatory classifications bear any relationship whatsoever to the purported regulatory objective of promoting maternal health, the decision below conflicts with numerous decisions of this Court. *See* Pet. at 22-23; *see also, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) ("The Equal Protection clause . . . den[ies] to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute"). Respondents adopt the Fourth Circuit's analysis, arguing that "abortion is a unique act," and that the state can therefore treat it differently than comparable medical procedures, regardless of the purpose of the law at issue. Op. Cert. at 14-15. This approach, if accepted, would lead to entirely irrational and unjust results. For example, the guarantee of equal protection would not prevent states from imposing taxes on abortions in order to pay for the maintenance of public parks, or from requiring that abortion patients, but no one else, get immunized against the flu. Moreover, regardless of whether this analysis is ultimately meritorious, Respondents have not contested that it blatantly conflicts with decisions of this Court.

IV. The Court Below Failed to Analyze Whether the Regulation Would Promote a Legitimate State Interest.

In analyzing whether the Regulation passes muster under this Court's privacy jurisprudence, the court below never examined whether the Regulation would serve a legitimate state interest. Pet. 24-25. Instead, that court improperly presumed that because the drafters reviewed national medical guidelines with respect to *some* of the Regulation's requirements, then the Regulation's purpose was to protect health, and indeed the Regulation as a whole is reasonably related to promoting health. A22, A27. This analysis conflicts with the decisions of this Court and the courts of appeals by reducing the *Casey* standard to an examination only of purpose, and ignoring the Regulation's actual effects on maternal health. *See* Pet. 24-25; *see also, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 972-74 (1997) (indicating importance of determining law's effect in applying *Casey* standard); *Hodgson,* 497 U.S. at 456-57 (striking down two-parent notification requirement because it failed to serve a legitimate state interest). Respondents make the same presumptions as the court below regarding the Regulation's effect on maternal health, Op. Cert. at 10, but they never address the conflict between those presumptions and the decisions of this Court and the courts of appeals.

V. The Decision Below Concludes that *Salerno* Applies to Facial Challenges to Abortion Restrictions.

The decision below concludes that that the "no circumstances" test of *Salerno*, 481 U.S. at 745, rather than the "large fraction" test of *Casey*, 505 U.S. at 895, applies to facial challenges to abortion restrictions. A14-16. This conclusion conflicts with numerous decisions of this Court and the courts of appeals. *See* Pet. at 29-30. Nonetheless, Respondents argue that because the decision below upholds

the Regulation under both the *Casey* and *Salerno* standards, the decision presents no conflict in this regard.

Regardless of whether the decision below amounts to dicta on the standard applicable to facial challenges, that decision clearly purports to establish the applicable law in the Fourth Circuit. Specifically, it construes a previous ruling of the Fourth Circuit, *Manning v. Hunt*, 119 F.3d 254, 268 n.4 (4th Cir. 1997), as *holding* that courts must apply *Salerno* to facial challenges of abortion restrictions. A15. This ruling will likely have the effect of establishing the law on this issue in that circuit. Accordingly, this Court should address the conflict between the Fourth Circuit's adoption of the *Salerno* standard in the abortion context and the conflicting decisions of this Court and the courts of appeals.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for a writ of certiorari.

Respectfully submitted,

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